

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH BRYAN MADDUX,

Defendant-Appellant.

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UNPUBLISHED

May 23, 2006

No. 257981

Wayne Circuit Court

LC No. 04-005427-01

Before: Murphy, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii), and possession of cocaine, less than 25 grams, MCL 333.7403(2)(a)(v). He was sentenced to 3 to 15 years’ imprisonment on the felon-in-possession conviction, 1 to 15 years’ imprisonment on the drug convictions, and 10 years’ imprisonment on the felony-firearm conviction, as mandated for a third or subsequent felony-firearm conviction, MCL 750.227b(1), which is to be served prior and consecutively to the other three concurrent sentences. We affirm.

This case arises out of law enforcement’s execution of a search warrant at defendant’s home in which marijuana and cocaine were found in an upstairs bedroom that was occupied by defendant at the time of the raid. A firearm was found in the home’s living room, behind a couch. The police obtained the warrant after an undercover drug transaction was effected at the home and after surveillance on the home revealed suspicious activity. Defendant argues that the trial court erred in not allowing withdrawal and substitution of counsel, that trial counsel was ineffective, that the evidence was insufficient to show that defendant “possessed” a firearm, and that his right to jury trial was violated with respect to sentencing under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Additionally, defendant raises multiple arguments in a Standard 4 supplemental brief submitted pursuant to Administrative Order No. 2004-6.

Defendant first argues that the trial court erred in not allowing withdrawal and substitution of defendant’s trial counsel. At trial, defendant told the trial court that he was “not satisfied” with counsel. Defendant claims that his trial counsel was not diligent in interviewing witnesses or filing motions, that there was an “irrevocable breakdown” in the attorney-client

relationship, and that the trial court failed to sufficiently explore defendant's request for substitution of counsel.

A trial court's decision on appointment of substitute counsel is reviewed for an abuse of discretion. *People v Mack*, 190 Mich App 7; 475 NW2d 830 (1991). A trial court's denial of a defense attorney's motion to withdraw is reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368-369; 592 NW2d 737 (1999). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made. *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999).

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to the attorney of his choice simply by requesting that the attorney originally appointed be replaced. *Mack, supra* at 14. Appointment of substitute counsel is warranted "only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Good cause is sufficiently shown when there is a legitimate difference of opinion between defendant and counsel regarding a fundamental trial tactic. *Id.* Matters of professional judgment and trial strategy, however, are matters generally entrusted to the attorney. *Id.* at 463. Good cause may be shown if defendant asserts that assigned counsel is "not adequate or diligent," or where the defendant asserts that "his lawyer is disinterested." *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973). But a mere lack of confidence in trial counsel will not warrant substitution. *Traylor, supra* at 463. Additionally, "a judge's failure to explore a defendant's claim that his assigned lawyer should be replaced does not necessarily require that a conviction following such an error be set aside." *Ginther, supra* at 442. Because no evidentiary hearing was held on this issue, our review is limited to errors apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Defendant claims that counsel failed to present a motion to suppress the search warrant and to assert an alibi defense.<sup>1</sup> This could amount to a difference of opinion on fundamental trial tactics. However, neither the record nor the briefs indicate the basis for the alibi defense. Defendant claims that alibi witnesses were available and makes the naked assertion that he was not present at the time and place of the controlled buy underlying the search warrant. Defendant fails, however, to name witnesses or to present his alleged alternative location. Defense counsel need not file frivolous motions nor take meritless positions. *Traylor, supra* at 463. The record indicates that defendant was, in significant part, responsible for the deficiency in locating and identifying witnesses, and defendant was not prejudiced by any lack of diligence in the filing of motions. Further, the record indicates that defendant was given substantial opportunity by the trial court to establish the basis for his claim before trial, but failed to do so. We find no abuse of discretion on the part of the trial court for failure to order substitute counsel.

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<sup>1</sup> A motion to quash or suppress the search warrant was indeed heard and denied by the court, although suppression based on defendant's claimed lack of presence at the home when the controlled buy occurred was not entertained by the court because it was not previously raised.

Defendant next argues that trial counsel was ineffective for failing to object to the introduction into evidence of a prior felony committed by defendant. That felony was a conviction for possession with intent to deliver cocaine, and defendant was charged in this case with, among other crimes, possession of cocaine.

A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law, and a trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant failed to file a motion for new trial or request a *Ginther* hearing, thus the issue of effectiveness of counsel has not been preserved for appellate review, and review by this Court is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *LeBlanc, supra* at 578. Specifically, a defendant is required to overcome the presumption that the action in question might be considered sound trial strategy. *Id.* at 578-579; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant cites *People v Swint*, 225 Mich App 353, 377; 572 NW2d 666 (1997), for the proposition that failure to stipulate to a prior conviction amounts to ineffective assistance of counsel. First, we note that while a trial court is essentially required to accept a stipulation if one is offered by a defendant, *id.* at 377-379, this does not make failure to stipulate ineffective assistance of counsel per se. In *Swint*, the issue was the trial court's refusal to accept the stipulation, not trial counsel's failure to make a stipulation. In this case, while defendant did face charges for cocaine possession, defendant also faced more serious charges involving possession of a firearm, when considering the mandatory sentence involved. The prior cocaine conviction did not involve a firearm. Therefore, defense counsel may have concluded that allowing the charge to be admitted into evidence was sound strategy, showing that defendant had committed like conduct without the use of a weapon. Further, evidence of defendant's commission of cocaine possession was overwhelmingly supported by testimony and other evidence offered at trial. We find that trial counsel did not perform below an objective standard of reasonableness, and, in any event, there is no reasonable probability that the proceeding would have turned out differently if trial counsel had stipulated to the prior felony. Counsel's assistance in this case was not ineffective.

Next, defendant argues that the evidence offered at trial was insufficient to show that he "possessed" a firearm. Defendant argues that at the time of his arrest he was in an upstairs bedroom, while the gun was located in the first floor living room behind a couch; therefore, he could not have been found in possession of firearm.

This Court reviews a claim of insufficiency of the evidence de novo. *People v Mayhew*, 263 Mich App 112, 124; 600 NW2d 370 (1999). When a defendant challenges the sufficiency of

the evidence, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002). “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). This Court will not interfere with the trier of fact’s role in determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Any conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Possession of a firearm can be either actual or constructive. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Constructive possession may be established “if the location of the weapon is known and it is reasonably accessible to defendant.” *Id.* Possession of a weapon during a drug-possession offense “can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it.” *Id.* at 439. In *Burgenmeyer*, where the defendant was arrested two blocks away from his home in which a gun and drugs were found, our Supreme Court stated that the “defendant’s access to the weapon should not be determined solely by reference to his arrest, but should also rely upon his access to it when the crime was committed.” *Burgenmeyer, supra*, at 435. The Court stated that “[i]n a case of that sort, the focus would be on the offense dates specified in the information.” *Id.* at 439.

Defendant was charged with possession of marijuana with intent to deliver and with possession of cocaine. It would be sufficient for the prosecution to show that defendant knew the location of the weapon and had reasonable access to it, thus constructively possessing it, either during the possession of the marijuana or of the cocaine, or while being a felon in possession of a firearm, on or about May 10, 2004, the date specified in the information.

Evidence was offered at trial that defendant stated, at the time of his arrest, that the home where he and the firearm were found was his residence. Additionally, defendant’s own witness referred to the residence as “his [defendant’s] house.” The evidence indicated that no one but defendant resided in the home. Because the weapon was found in defendant’s home, a reasonable juror could infer that defendant knew of its location. Because the gun was found in the living room, where zip-lock baggies identified as the type used in drug sales were found, and which were in fact the same type as 27 baggies found in the bedroom with defendant filled with marijuana in apparent preparation for sale, a reasonable juror could conclude that drug activity was taking place in the living room, in close proximity to the weapon on the day of defendant’s arrest, and therefore the gun was reasonably accessible to the defendant during the commission of the crime. Viewing the evidence in a light most favorable to the prosecution, defendant’s argument that the evidence was insufficient for conviction fails.

Defendant next argues that his right to a jury trial was violated with respect to sentencing under *Blakely, supra*. Defendant claims that the fact of his prior convictions, which were considered at sentencing in enhancing his penalty, were not found by a jury beyond a reasonable doubt, thus violating his right to jury trial.

The issue is raised for the first time on appeal. In Michigan, a sentencing court may consider all record evidence before it in establishing a sentence, including admissions by the

defendant, trial evidence or testimony, and the presentencing report. *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993). We note that the Michigan Supreme Court has granted leave to specifically address the question whether *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 261 (2005), apply to Michigan’s sentencing scheme. *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005). However, we further note that the Michigan Supreme Court has already held that, because Michigan’s sentencing scheme is indeterminate and *Blakely* addressed a determinate sentencing system, “the Michigan system is unaffected by the holding in *Blakely*.” *People v Claypool*, 470 Mich 715, 730; 684 NW2d 278 (2004).

In this case, the only fact required to be found for defendant’s sentence enhancement was the existence of prior convictions, and this was established at the sentencing hearing through defendant’s presentence investigation report (PSIR). Defendant effectively waived this issue at his sentencing hearing when he stipulated that the PSIR was accurate. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). And *Blakely* specifically makes an exception for prior convictions, holding that “[o]ther than the fact of a prior conviction” any fact that increases the penalty for a crime must be found beyond a reasonable doubt by a jury. *Blakely, supra* at 301. Defendant’s argument fails on all levels.

Defendant also presents arguments in his Standard 4 supplemental brief. Defendant’s arguments in this brief are largely rambling and barely coherent, if at all. The discernable claims substantially mirror the claims stated and addressed above. Inasmuch as defendant makes a claim that bindover was improper, the record reveals that a proper bindover was effected, both procedurally and substantively, and defendant’s claim is without merit. Inasmuch as prosecutorial misconduct is claimed, the record provides no support for this contention, and defendant’s argument fails. Defendant’s additional claim of ineffective assistance of appellate counsel is totally unsupported and without merit. On review of all the arguments that can be deciphered, we conclude that there is no legal, factual, or record support for the arguments. Reversal is unwarranted.

Affirmed.

/s/ William B. Murphy  
/s/ Peter D. O’Connell  
/s/ Christopher M. Murray